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In the Supreme Court
OF THE
United States

OCTOBER TERM 1987

A. JACQUES LOU,
Petitioner,

vs.

WILLIAM BELZBERG, et al.,
Respondents,

and

ASHLAND OIL, INC.,
Nominal Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals' conclusion that a private right of action does not exist under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), is (i) in accordance with recent decisions of this Court setting forth strict standards for implied private rights of action and (ii) consistent with recent decisions of the other federal circuit and district courts denying § 17(a) claims based on those standards.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent William Belzberg respectfully requests this Court to deny the petition for a writ of certiorari, seeking review of the judgment and opinion issued by the United States Court of Appeals for the Ninth Circuit on November 12, 1987, and reported at 834 F.2d 730 (1987).

STATEMENT OF THE CASE

This litigation grows out of the April 1986 purchase by Ashland Oil Company, Inc. ("Ashland") of the 9.2% stake

of Ashland common stock held by First City Financial Corporation Limited and First City Trust Company (collectively, "First City"), two Canadian entities controlled by the Belzberg family. Ashland entered into the stock purchase agreement after First City's efforts to acquire 100% of Ashland stock at $60.00 per share were unsuccessful. Under the stock purchase agreement, Ashland agreed to purchase 2.6 million shares owned by First City for $51.00 per share, a price below the then market price for Ashland stock. The central question on the underlying merits is whether the decision by the Board of Directors of Ashland was protected by the business judgment rule or whether it constituted an allegedly improper "greenmail" payment. The § 17(a) private right of action issue raised by Petitioner will not determine the outcome of any underlying issue on the merits.

A. The Lou Action.

This action has had a complicated procedural history from the outset. Petitioner Lou first filed her complaint in California state court on April 6, 1986 seeking, among other things, an injunction blocking the stock purchase agreement, rescission of the agreement, and imposition of a constructive trust on all funds received by First City from Ashland pursuant to the transaction. She purportedly brought this action as a derivative suit on behalf of Ashland and as a class action on behalf of all persons, save defendants, who owned shares of Ashland common stock on April 1, 1986 — the date the stock purchase agreement was publicly announced.

On April 14, 1986, Petitioner filed an amended complaint which was identical in material respect to the original complaint, except for the addition of two claims under § 17(a) of the Securities Act of 1933. Pursuant to

§ 22(a) of the 1933 Act, 15 U.S.C. § 77v(a), claims brought under the Act in state court are nonremovable. However, the § 17(a) claims failed to plead an essential element under then existing Ninth Circuit law. Specifically, prior to the abolition of any private right of action under § 17(a) in *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation)*, 823 F.2d 1349 (9th Cir. 1987), it was settled in the Ninth Circuit that "[i]n order to bring a claim under section 17(a), the plaintiff must be a purchaser or seller." *Mosher v. Kane*, 784 F.2d 1385, 1390-91 (9th Cir. 1986). Because Petitioner failed to allege that she or any other member of the purported class was a defrauded purchaser or seller during the relevant period, the § 17(a) claims were facially deficient.

In addition to the § 17(a) allegations, the amended pleading contains various state law claims and separate and independent claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO").

B. The District Court Proceedings.

On April 17, 1986, Respondent William Belzberg removed the action to the United States District Court for the Central District of California pursuant to 28 U.S.C. §§ 1441(a) and (c). Removal was predicated on the presence of separate and independent claims arising under the federal RICO statute, a basis for federal jurisdiction which could not be defeated by the inclusion of otherwise nonremovable claims purporting to arise under the 1933 Act. Moreover, Respondent Belzberg contended that because the § 17(a) causes of action were facially insufficient, the nonremoval provision of the 1933 Act was inapplicable.

Following removal, Petitioner moved to remand the action to state court. Simultaneously, certain of the defendants, including Respondent, cross-moved to transfer the action to the Southern District of New York, where the stock purchase agreement was negotiated and performed and where the principal witnesses and documents are located.

On May 15, 1986, the District Court denied Petitioner's motion to remand and granted Respondent's cross-motion to transfer. The Court denied the motion to remand on two grounds. First, it reasoned that the nonremoval provision of the 1933 Act did not apply because the § 17(a) claims on their face failed to state a valid claim for relief. Second, the Court determined that the RICO claims were "separate and independent" from the § 17(a) claims, making the action removable under 28 U.S.C. § 1441(c) regardless of the presence of the 1933 Act claims.

Following removal and transfer of the *Lou* action, a new class representative, Pauline Mickler, represented by some of the same counsel as Petitioner Lou, commenced yet another class action and shareholders' derivative suit in California state court on May 27, 1986. This action, captioned *Mickler v. William Belzberg, et al.*, Case No. CA 000983, is nearly identical to the earlier *Lou* action, except for the addition of certain defendants and law firms and the deletion of the § 17(a) claims and RICO claims, which provided the original basis for the removal of the *Lou* action.[1]

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[1]Plaintiff Mickler's willingness to voluntarily forego the assertion of claims under § 17(a) in her "mirror" state court complaint undercuts Petitioner's claim here that she has been deprived of significant relief in that court.

Upon Respondent's motion, the District Court enjoined prosecution of the *Mickler* action.

C. The Ninth Circuit Decision.

Petitioner Lou and Plaintiff Mickler, as well as their counsel, appealed all three orders — denial of the remand motion, grant of a change of venue and entry of a preliminary injunction — to the United States Court of Appeals for the Ninth Circuit. The appeals were argued in early October 1986, but ordered withdrawn from submission in February 1987 pending the decision by an *en banc* panel of the Ninth Circuit in *Puchall*. After the *Puchall* case was decided in July 1987, the *Lou* appeal was ordered resubmitted.

The Ninth Circuit affirmed the District Court's ruling on the motion to remand, but for reasons different from those relied upon by the lower court. On the authority of the *Puchall* opinion, the Ninth Circuit held that there was no private right of action under § 17(a). The Court therefore did not reach the issues decided by the District Court, namely, whether the § 17(a) claims had otherwise been properly pled and whether they were "separate and independent" from the RICO claims. The Court held instead that state and federal courts have concurrent jurisdiction over RICO claims and that removal thus was proper under 28 U.S.C. § 1441(a). The Court affirmed transfer of the *Lou* action to the Southern District of New York, but vacated the stay in the *Mickler* action. That action is now proceeding in California state court. This petition challenges only the Ninth Circuit's § 17(a) determination.

REASONS FOR DENYING THE WRIT

Respondent Belzberg opposes issuance of a Writ of Certiorari on four grounds.

First, contrary to Petitioner's contention, there is no clear conflict among the federal Courts of Appeals on the issue of whether § 17(a) of the 1933 Act creates a private right of action. The consistent trend among the Courts of Appeals which have reached the issue is to deny a private remedy. Indeed, every Circuit which has recently addressed the question either has expressly denied a private right of action or has called into question its past precedents to the contrary.

Second, the decisions of the Ninth Circuit in *Puchall* and in this case are in full accord with the standards articulated and applied by this Court in determining whether a statute creates an implied private right of action.

Third, Petitioner, as a class representative of the shareholders of Ashland, and as a derivative representative of the corporation, has no substantial interest at stake in the outcome of this controversy because neither the shareholder class nor the derivatively represented corporation has been deprived of a state forum in which to pursue its many claims.

Finally, the procedural posture of this action militates against granting certiorari, since review and reversal of the question presented ultimately would not change the result reached below.

I

THERE IS NO LIVE CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE PRESENTED

Petitioner, at footnote 3, purports to provide "a summary of the recent rulings by the Circuits," which supposedly shows the existence of a conflict on the § 17(a) issue. The summary, however, is materially defective.

The divergence of authority to which Petitioner refers is illusory because most of the cases cited were decided *prior* to this Court's seminal decisions in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), which specifically prescribed the circumstances under which a private right of action may be implied. Indeed, the courts which have applied the *Touche Ross/Transamerica* analysis to § 17(a) have uniformly determined that no such private right of action exists. (A list of the cases which have applied the required analysis to § 17(a) and determined that a private action may not be implied has been attached as Appendix A for the Court's convenience.)

Petitioner's summary further fails to bring to the Court's attention cases decided by the Second, Fourth and Seventh Circuits which have seriously questioned the continuing vitality of the *only* federal appellate decisions finding an implied private right of action under § 17(a), and, therefore, creating the existence of an inter-Circuit conflict on that question.[2]

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[2]It is undisputed that the Fifth, Eighth, Ninth and Eleventh Circuits have expressly denied a private right of action under § 17(a).

In *Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555 (2d Cir. 1985), the *Second Circuit* specifically questioned the propriety of its earlier decision in *Kirshner v. United States*, 603 F.2d 234 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), which had found a private right of action. Writing for the court, Judge Friendly, whose concurring remarks in *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969), formed the basis of the *Kirshner* decision, stated:

> Our references in this opinion to the Securities Act are not intended as taking any position on the question of whether there is an implied cause of action for damages for violation of § 17(a) of the 1933 Act, 15 U.S.C. § 77q(a).... In *Kirshner v. United States*, ... this court held, in an opinion characterized by Professor Loss as being 'with no analysis,' Fundamentals of Securities Regulations 1149 (1983), that there was such a cause of action. *This conclusion may be open to reexamination, however, in light of the subsequent Supreme Court decisions noted above and Professor Loss' comparison of the differences among the provisions for civil liability contained in the 1933 and 1934 Acts, and his analysis of the legislative history of § 17. See* Loss, *supra,* at 1148-50; *see also* 3 Bromberg and Lowenfels, Securities Law § 8.5 (330)-(338) (1982).

751 F.2d at 559 n.3 (emphasis added).

The *Fourth Circuit* also has indicated a lack of confidence in its previous recognition of an implied right of action. In *SEC v. American Realty Trust*, 586 F.2d 1001 (4th Cir. 1978), the Fourth Circuit explicitly called into question its earlier decision in *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), which found a private right of action under § 17(a). The court in *American Realty Trust* stated:

"[T]o hold that § 17(a)(2) creates a private right of action would probably require some substantial disregard of the whole legislative scheme." 586 F.2d at 1006.

The *Seventh Circuit* similarly has retreated from its holding in *Lincoln National Bank v. Herber*, 604 F.2d 1038 (7th Cir. 1979). In its most recent decisions on the subject, the court stated that the issue of whether an implied right of action under § 17(a) exists is an "open question" in that Circuit. *Ray v. Karris*, 780 F.2d 636, 641 n.3 (7th Cir. 1985); *Teamsters Local 282 Pension Trust Fund v. Angelos*, 762 F.2d 522, 530 (7th Cir. 1985); *Peoria Union Stock Yards Co. Retirement Plan v. Penn. Mutual Life Ins. Co.*, 698 F.2d 320, 323 (7th Cir. 1983).

Additionally, Petitioner erroneously cites a Sixth Circuit case, *Kellman v. ICS, Inc.*, 447 F.2d 1305 (6th Cir. 1971), as holding that § 17(a) creates a private right of action. *Kellman* did not do so, as confirmed by the Sixth Circuit's subsequent decision in *Herm v. Stafford*, 663 F.2d 669 (6th Cir. 1981), in which the Sixth Circuit made clear that it had not decided the § 17(a) question. After noting decisions in other Circuits and the fact that the § 17(a) issue was not raised on appeal, the court in *Herm* expressly declared: "[W]e assume, *without deciding*, that a private right of action exists." 663 F.2d at 678 n.12 (emphasis added); *see also Gilbert Family Partnership v. Nido Corp.*, No. 86-CV-72781-DT (E.D. Mich. Feb. 9, 1988) (available on Lexis, 1988 U.S. Dist. Lexis 1039) (in finding *no* private right of action under § 17(a), the court preliminarily noted that the "Court of Appeals for the Sixth Circuit has never spoken on the question.").

Finally, Petitioner has failed to mention the state of the law respecting § 17(a) in the *Tenth*, *First* and *District of Columbia Circuits*. The Tenth Circuit has expressed "considerable doubt" as to whether a private right of

action exists under § 17(a). *See Ohio v. Peterson, Lowry, Rall, Barber & Ross,* 651 F.2d 687, 689 n.1 (10th Cir.), *cert. denied,* 454 U.S. 895 (1981). Although the First and District of Columbia Circuits have not yet ruled on the question, the overwhelming majority of district courts in these Circuits recently have, as set forth below, denied a private right of action under § 17(a).

For the convenience of the Court, the following is a review of the state of the law on § 17(a) on a Circuit-by-Circuit basis:

DISTRICT OF COLUMBIA: The District of Columbia Circuit explicitly left open the question of whether § 17(a) gives rise to a private right of action in *Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 650 F.2d 342, 350 n.19 (D.C. Cir. 1980), *cert. denied,* 452 U.S. 954 (1981). Two district courts, *Bender v. Rocky Mountain Drilling Associates,* 648 F.Supp. 330, 334 n.3 (D.D.C. 1986), and *Hammerman v. Peacock,* 607 F.Supp. 911, 915 (D.D.C. 1985), have declined to imply a private right of action under § 17(a).

FIRST CIRCUIT: The First Circuit has not addressed the issue of § 17(a). The district courts, however, consistently have refused to find a private right of action. *Prestera v. Shearson Lehman Brothers Inc.*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,884, at ¶ 94,290 (D. Mass. 1986); *Xaphes v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.Supp. 213, 217 (D. Me. 1984); *Kilmartin v. H.C. Wainwright & Co.*, 580 F.Supp. 604, 609 (D. Mass. 1984); *Gilman v. Shearson/American Express, Inc.*, 577 F.Supp. 492, 497 (D.N.H. 1983); *Massaro v. Vernitron Corp.*, 559 F.Supp. 1068, 1078 (D. Mass. 1983); *Kaufman v. Magid,* 539 F.Supp. 1088, 1098 (D. Mass. 1982); *Manchester Bank v. Connecticut Bank & Trust Co.*,

497 F.Supp. 1304, 1314 (D.N.H. 1980). *But see Federal Savings & Loan Insurance Corp. v. Shearson-American Express, Inc.*, 658 F.Supp. 1331, 1344 (D.P.R. 1987) (finding action); *Valles Salgado v. Piedmont Capital Corp.*, 452 F.Supp. 853, 857-58 (D.P.R. 1978) (same).

SECOND CIRCUIT: In *Kirshner v. United States*, 603 F.2d 234 (2d Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), the Second Circuit found that a private right of action existed under § 17(a). The Second Circuit, however, has indicated that it would reexamine its finding in *Kirshner*. *See Yoder v. Orthomolecular Nutrition Institute, Inc.*, 751 F.2d 555, 559 n.3 (2d Cir. 1985). Numerous district courts have refused to follow *Kirshner* in light of intervening decisions by this Court on implied rights of action and have determined that § 17(a) does not provide a private right of action. *See, e.g., Beres v. Thomas McKinnon Securities, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,395, at 97,072 (S.D.N.Y. 1987); *Cohen v. Goodfriend*, 665 F.Supp. 152, 155-56 (E.D.N.Y. 1987); *Ackerman v. Clinical Data, Inc.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,207, at 91,570-71 (S.D.N.Y. 1985); *Somerville v. Major Exploration, Inc.*, 576 F.Supp. 902 (S.D.N.Y. 1983); *Eriksson v. Galvin*, 484 F.Supp. 1108, 1127 (S.D.N.Y. 1980). *But see Toberoff v. B-J, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,611, at 97,739 (S.D.N.Y. 1988) (finding action based upon *Kirshner*).

THIRD CIRCUIT: *Mursau Corp. v. Florida Penn Oil & Gas, Inc.*, 638 F.Supp. 259 (W.D. Pa. 1986), *aff'd without opinion*, 813 F.2d 398 (3d Cir. 1987) (denies action).

FOURTH CIRCUIT: In *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975), the court found an implied right of action under § 17(a). The Fourth Circuit, subsequently examin-

ing the point, indicated that the existence of a § 17(a) private right of action is subject to doubt. See *SEC v. American Realty Trust,* 586 F.2d 1001, 1006 (4th Cir. 1978).

FIFTH CIRCUIT: *Corwin v. Marney, Orton Investments,* 788 F.2d 1063 (5th Cir. 1986) (denies action); *Landry v. All American Assurance Co.,* 688 F.2d 381 (5th Cir. 1982) (denies action).

SIXTH CIRCUIT: In its most recent decision on the subject, the Sixth Circuit has declared that the § 17(a) question is an open issue. *Herm v. Stafford,* 663 F.2d 669 (6th Cir. 1981). Significantly, in so concluding, the court did not mention *Kellman v. ICS, Inc.,* 447 F.2d 1305 (6th Cir. 1971), a case which Petitioner erroneously cites as finding an implied right of action. District courts within the Sixth Circuit have routinely held that no private action lies under § 17(a). *See Memphis Housing Authority v. Paine, Webber, Jackson & Curtis, Inc.,* 639 F.Supp. 108, 111-14 (W.D. Tenn. 1986); *Jones v. First Equity Corp. of Florida,* 607 F.Supp. 350, 354-55 (E.D. Tenn. 1985); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 551 F.Supp. 580, 586-87 (S.D. Ohio 1982); *Ingram Industries, Inc. v. Nowicki,* 502 F.Supp. 1060, 1069 (E.D. Ky. 1980).

SEVENTH CIRCUIT: The Seventh Circuit has declared that the issue is an "open question." *Ray v. Karris,* 780 F.2d 636, 641 n.3 (7th Cir. 1985); *Teamsters Local 282 Pension Trust Fund v. Angelos,* 762 F.2d 522, 530 (7th Cir. 1985); *Peoria Union Stock Yards Co. Retirement Plan v. Penn. Mutual Life Ins. Co.,* 698 F.2d 320, 323 (7th Cir. 1983). The district courts in that Circuit overwhelmingly have denied a private right of action under § 17(a). *Design Time, Inc. v. Synthetic Diamond Technology, Inc.,* 674 F.Supp. 1564, 1572-74 (N.D. Ind. 1987); *Beck v. Cantor, Fitzgerald & Co., Inc.,* 621 F.Supp. 1547, 1559-60

(N.D. Ill. 1985); *Wagman v. FSC Securities Corp.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,445, at 92,716 (N.D. Ill. 1985); *Citizens State Bank of Wittenberg v. Continental Assurance Co.*, 598 F.Supp. 1111, 1114-15 (W.D. Wis. 1984); *Roskos v. Shearson/American Express, Inc.*, 589 F.Supp. 627, 630-31 (E.D. Wis. 1984).

EIGHTH CIRCUIT: *Deviries v. Prudential-Bache Securities, Inc.*, 805 F.2d 326, 328 (8th Cir. 1986) (denies action); *Brannan v. Eisenstein*, 804 F.2d 1041, 1043 n.1 (8th Cir. 1986) (denies action).

NINTH CIRCUIT: *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation)*, 823 F.2d 1349 (9th Cir. 1987) (denies action).

TENTH CIRCUIT: The Tenth Circuit has expressed "considerable doubt" about whether § 17(a) offers a private right of action. *Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 689 n.1 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981). The prevailing view among Tenth Circuit district courts is that no private right of action exists. *Jiffy Lube International, Inc. v. Grease Monkey Holding Corp.*, 671 F.Supp. 1275, 1278 (D. Colo. 1987); *Citizens State Bank v. FDIC*, 639 F.Supp. 758, 779-80 (W.D. Okla. 1986); *In re Storage Technology Corp. Securities Litigation*, 630 F.Supp 1072, 1079-80 (D. Colo. 1986); *Masri v. Wakefield*, 602 F.Supp. 404, 406 (D. Colo. 1983); *Freeman v. McCormack*, 490 F.Supp. 767, 768 (W.D. Okla. 1980). *But see Richey v. Westinghouse Credit Corp.*, 667 F.Supp. 752 (W.D. Okla. 1986).

ELEVENTH CIRCUIT: *Currie v. Cayman Resources Corp.*, 835 F.2d 780 (11th Cir. 1988) (denies action).

Thus, Petitioner's assertion of conflict among the Circuits is without foundation. There is presently no live

controversy on the issue within the Circuits. All Circuits either expressly deny a private right of action under § 17(a) or regard the issue as an open question, and a distinct consensus that no private right exists has developed within the federal system. Thus, there is no need for this Court to grant certiorari to resolve a conflict which simply does not exist.

II

THE NINTH CIRCUIT CORRECTLY HELD UNDER THIS COURT'S STANDARDS FOR DETERMINING CONGRESSIONAL INTENT THAT § 17(a) DOES NOT AFFORD A PRIVATE RIGHT OF ACTION

A. The Decision Of The Ninth Circuit Conforms With This Court's Controlling Precedents On Implied Rights Of Action.

Ironically, although Petitioner presents the question of whether a private right of action should be implied under a federal statute, the petition does not mention, much less discuss, recent decisions of this Court which are determinative of this issue. Inexplicably, Petitioner fails to address the Ninth Circuit's decision under the analytic framework prescribed by this Court. Proper analysis demonstrates that the decision reached by the Ninth Circuit Court of Appeals is correct and fully consonant with this Court's controlling precedents on the subject of implied rights of action.

In a series of recent decisions, principally *Cort v. Ash*, 422 U.S. 66 (1975), *Touche Ross*, and *Transamerica*, this Court has revealed its reluctance to imply a private right of action under a federal regulatory statute absent a clear, ascertainable legislative intent to grant such a right. Consistent with those decisions, this Court has

articulated a strict standard for determining whether a given statutory provision gives rise to an implied private right of action. *Touche Ross,* 442 U.S. at 578. These decisions leave no doubt that congressional intent overrides all other considerations. Thus, in *Touche Ross,* this Court declined to imply a private right of action under § 17(a) of the 1934 Act because it found no evidence of congressional intent to do so. Its task, said the Court, "is limited solely to determining whether Congress intended to create the private right of action asserted," 442 U.S. at 568, and not "whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Id.* at 578.

In *Transamerica,* this Court refused to find an implied right of action under § 206 of the Investment Advisers Act of 1940, an antifraud provision strikingly similar to § 17(a). As it did in *Touche Ross,* this Court confined its inquiry to the question of congressional intent, determining that "[t]he dispositive question remains whether Congress intended to create any such remedy." 444 U.S. at 24.

By confining its analysis to the specific question of congressional intent, this Court sharply has defined the standards which must be met before a private right of action may be implied. Following *Touche Ross* and *Transamerica,* this Court repeatedly has applied its strict approach to deny implication of private rights of action.[3] The Court's recent decisions reaffirming *Touche Ross* and

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[3] *See, e.g., Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134 (1985); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630 (1981); *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77 (1981); *Universities Research Ass'n, Inc. v. Coutu,* 450 U.S. 754 (1981).

Transamerica establish that a private right of action may be implied only in those instances where the Court can find that "Congress intended to create the private right of action asserted . . . ." *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 770 (1981).

The intent of Congress is to be discerned solely by examining three factors: (a) the language of the statute; (b) its legislative history; and (c) whether implying a private right of action would be consistent with the overall statutory scheme. *Touche Ross*, 442 U.S. at 575-76; *Transamerica*, 444 U.S. at 23-24. "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 (1981).

Applying the analysis mandated by this Court, the Ninth Circuit properly concluded in *Puchall* that Congress did not intend to create a private right of action under § 17(a). After carefully examining the language of the statute, its legislative history and the statutory context within which it appeared, the Ninth Circuit determined that implication of a private right of action under § 17(a) would be entirely *inconsistent* with Congress' manifest intent. That reasoned decision is sound and fully consistent with this Court's decisions refusing to imply a private right of action under a federal statute absent a clear showing of congressional intent to do so. Nor is the Ninth Circuit alone in reaching this conclusion. The federal courts which have analyzed § 17(a) within the framework established by this Court in *Cort* and its progeny similarly have concluded that no private right of action may be implied under § 17(a). (See Appendix A.)

In challenging the decision below, Petitioner does not dispute that neither the language of § 17(a)[4] nor its legislative history[5] supports implication of a private right of action. *Puchall,* 823 F.2d at 1353-55. However, Petitioner totally ignores the fact that implication of a private right of action under § 17(a) would be utterly inconsistent with the comprehensive statutory structure and would supplant existing, express remedies. In enacting the 1933 Act, Congress provided express private rights of action in §§ 11 and 12, subject to strict procedural limitations and specific defenses defined in the Act. For example, both § 11 and § 12 are subject to the one-year statute of limitations in § 13 of the Act. *See* § 15 U.S.C. § 77m. Under § 11(a), only those purchasing securities issued under the challenged registration statement can sue. Section 11(b) grants a defendant other than the issuer a "due diligence" defense. Section 12 requires privity between the purchaser and seller.

Although § 17(a) may prohibit the same type of conduct as §§ 11 and 12(2), on its face § 17(a) does not contain the procedural limitations and exclusions imposed by Congress on actions brought under §§ 11 and 12(2). Congress would not on the one hand create express

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[4]The statutory language of § 17(a) reveals no intent to create a private right of action. The statute "merely represents a general censure of fraudulent practices." *Puchall*, 823 F.2d at 1353; *Landry v. All American Assurance Co.*, 688 F.2d 381, 389 (5th Cir. 1982).

[5]The legislative history of the 1933 Act confirms that Congress did not intend to create an implied right of action. The section of the House Committee Report entitled "Civil Liberties" states that "sections 11 and 12 (15 U.S.C. sections 77k and 77*l*) create and define the civil liabilities imposed by the act and the machinery for their enforcement." H.R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933). This section of the Report details the private rights of action expressly enacted in §§ 11 and 12, but does not mention § 17(a) at all.

rights of action under §§ 11 and 12 subject to carefully crafted defenses, and on the other hand intend an implied right of action under the broad anti-fraud provisions of § 17(a) subject to none of the same limitations. Thus, as the Ninth Circuit properly concluded, implying a private remedy under § 17(a) would undermine the carefully crafted limitations imposed by Congress on §§ 11 and 12(2). 823 F.2d at 1354-55. *Accord Landry v. All American Assurance Co.*, 688 F.2d 381, 390 (5th Cir. 1982) (an implied cause of action under § 17(a) "would effectively frustrate the carefully laid framework of the Act"). *See also Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("The assumption of inadvertent omission is rendered especially suspect upon close consideration of [the statute's] interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.' ")

Nor does this Court's decision in *Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983), compel a different result. In *Huddleston*, the central issue was whether an implied right of action could be found under § 10(b) of the 1934 Act even though § 11 of the 1933 Act provided an express private cause of action for conduct proscribed under § 17(a) of the 1933 Act. Petitioner fails to acknowledge that *Huddleston* was decided *after* an implied right under § 10(b) had been universally recognized by the courts for more than 35 years, 459 U.S. at 380, and that Congress had implicitly ratified these consistent, pervasive judicial determinations. *Id.* at 385. Furthermore, the *Huddleston* Court explicitly recognized that § 11 and § 10(b) address different types of wrongdoing, *id.* at 382,

and that § 10(b), unlike § 17(a), requires proof of scienter and does not encompass negligent conduct. *Id.* at 383.[6]

Moreover, in *Huddleston* this Court explicitly recognized that "extension of 10(b) to negligent conduct would have allowed causes of action for negligence under the express remedies to be brought instead under § 10(b), 'thereby nullify[ing] the effectiveness of the carefully drawn procedural restrictions on these express actions.' " 459 U.S. at 384 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 (1976)).

Thus, far from undermining the decision below, *Huddleston* actually provides further support that an implied right of action under § 17(a) would be inconsistent with the statutory structure and frustrate the overall legislative scheme. The Ninth Circuit recognized this very point in *Puchall:*

> To permit a private right of action under § 17(a) would cause the statutory and judicially-crafted restrictions on § 10(b) of the 1934 Act and §§ 11 and 12 of the 1933 Act to atrophy and fall away as securities fraud cases hustled in the back door of § 17.

823 F.2d at 1356 n.17 (quoting *Roskos v. Shearson/American Express, Inc.*, 589 F.Supp. 627, 631 (E.D. Wis. 1984)); *see also Kimmel v. Peterson*, 565 F.Supp. 476, 485 (E.D. Pa. 1983) ("[I]mplication of a private right of action under section 17(a) would allow and encourage the total circumnavigation of the new restrictions the Court has placed on a section 10(b) cause of action.").

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[6]Section 10(b) also requires an actual purchase or sale (*Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34 (1975)), whereas § 17(a) can, by its language, apply to offers.

B. The Ninth Circuit Properly Applied This Court's Contemporary Legal Context Test In Discerning Congressional Intent.

Contrary to Petitioner's contention, the Ninth Circuit correctly assessed the contemporary legal context test for determining congressional intent. Thus, the decision below is fully consistent with *Huddleston* and *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982).

In *Curran*, this Court, acknowledging that the lower federal courts before 1974 had "routinely and consistently" and without "any doubt" recognized an implied right of action under the Commodity Exchange Act, determined that the extensive reenactment of that Act in 1974 — in view of that "uniform and well-understood" case law and the "absence of any dispute" — demonstrated congressional intent to preserve that remedy. 456 U.S. at 379-81. The *Huddleston* Court similarly ruled that the 1975 reenactment and amendment of the Securities Exchange Act of 1934 suggested congressional acceptance of an implied private right of action under § 10(b) because by 1975 "federal courts had consistently and routinely" recognized such implied rights of action. 459 U.S. at 385.

The *Huddleston-Curran* "legislative reenactment" argument posited by Petitioner, however, is insupportable with respect to § 17(a). In contrast to the statutory provisions involved in those two decisions, § 17(a) did not enjoy such unanimity among the courts in 1975.[7] At the

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[7]The Court in *Huddleston* noted that in 1975 all but two district courts had allowed a private remedy under § 10(b), and one had been overruled and the other was not followed by other courts in the district or circuit. Thus, unlike the situation existing with respect to

time the 1933 Act was amended in 1975, "there remain[ed] a divergence of opinion on the subject" of whether a private right of action existed under § 17(a). *See Reid v. Mann*, 381 F. Supp. 525, 528 (N.D. Ill. 1974); *see also Unicorn Field, Inc. v. Cannon Group, Inc.*, 60 F.R.D. 217, 224 (S.D.N.Y. 1973). The courts and commentators were divided on this question and, reflective of this division, numerous courts had concluded that there was *no* implied right of action under § 17(a).[8] Most significantly, this Court itself contemporaneously acknowledged *in 1975* that the existence of a private right of action under § 17(a) had not yet been resolved. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 733-34 n.6 (1975) (citing split in authorities). Accordingly, as the Ninth Circuit ultimately concluded, the *Huddleston-Curran* argument sheds no light on the implication of a private right of action under § 17(a). *Puchall*, 823 F.2d at 1356-57; *see also Memphis Housing Authority v.*

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§ 17(a), the Court concluded that the issue was "simply beyond peradventure." 459 U.S. at 380 n.10. Similarly, every court that had examined the statute at issue in *Curran* prior to 1974 had concluded that there was a private right of action under the CEA. 456 U.S. at 379-81.

[8] *See, e.g., Greater Iowa Corp. v. McLendon*, 378 F.2d 783 (8th Cir. 1967); *Architectural League of N.Y. v. Bartos*, 404 F.Supp. 304, 313 (S.D.N.Y. 1975); *Welch Foods, Inc. v. Goldman, Sachs & Co.*, 398 F.Supp. 1393, 1399-1401 (S.D.N.Y. 1974); *Reid v. Mann*, 381 F.Supp. 525, 526-28 (N.D. Ill. 1974); *Ferland v. Orange Groves of Florida, Inc.*, 377 F.Supp. 690, 706-07 (M.D. Fla. 1974); *Cowsar v. Regional Recreations, Inc.*, 65 F.R.D. 394, 398 (M.D. La. 1974); *Hardy v. Sanson*, 356 F.Supp. 1034, 1038 (N.D. Ga. 1973); *Dyer v. Eastern Trust & Banking Co.*, 336 F.Supp. 890, 903-05 (D. Me. 1971); *Emmi v. First-Manufacturers National Bank of Lewiston & Auburn*, 336 F.Supp. 629, 635 (D. Me. 1971); *Trussell v. United Underwriters, Ltd.*, 228 F.Supp. 757, 766-69 (D. Colo. 1964). *See also* L. Loss, *Securities Regulation* 3913, 3914 (2d ed. Supp. 1969) ("the only considered opinions" reject a § 17(a) cause of action).

Paine, Webber, Jackson & Curtis, Inc., 639 F.Supp. 108, 113 (W.D. Tenn. 1986) ("reasoning of *Curran*" not applicable to § 17(a)); *Ethanol Partners Accredited v. Wiener, Zuckerbrot, Weiss & Brecher*, 617 F. Supp. 300, 303 (E.D. Pa. 1985) (*Huddleston* not controlling in examining whether there is a private right of action under § 17(a)).

Manifestly, there was no uniform, established line of precedent in 1975 recognizing an implied right of action under § 17(a). Petitioner's resort to counting cases is mere sophistry. This Court in *Blue Chip Stamps* and many other courts have concluded, as did the Ninth Circuit in *Puchall*, that, as of 1975, the state of the law was unclear on whether a private right of action existed under § 17(a).[9] Thus, in rejecting the argument that *Huddleston*

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[9]In Appendix H of her petition, Petitioner cites cases and contends that Circuits had found an implied right of action under § 17(a) as of 1975. Many of these cases simply do not stand for the stated proposition. A careful reading of these cases demonstrates that, in some of them, the issue of an implied remedy was either not addressed or not raised. *See, e.g., Superintendent of Insurance v. Bankers Life and Casualty Co.*, 430 F.2d 355 (2d Cir. 1970), *rev'd on other grounds*, 404 U.S. 6 (1971) (issue of implied right of action not raised or discussed); *Slavin v. Germantown Fire Insurance Co.*, 174 F.2d 799 (3d Cir. 1949) (plaintiff's suit was brought solely under § 10(b) and did not involve any § 17(a) claims); *Phillips v Alabama Credit Corp.*, 403 F.2d 692 (5th Cir. 1968) (question of implied right of action under § 17(a) not raised or explicitly addressed); *Allico National Corp. v. Amalgamated Meat Cutters and Butcher Workmen*, 397 F.2d 727 (7th Cir. 1968) (same); *Surowitz v. Hilton Hotels Corp.*, 342 F.2d 596 (7th Cir. 1965), *rev'd on other grounds*, 383 U.S. 363 (1966) (same).

Petitioner's strained effort to bolster her "legislative reenactment" theory does not end there. In the same Appendix H, Petitioner refers to other courts which had assumed that an implied right existed under § 17(a) "as of 1975." Inexplicably, Petitioner cites cases decided *after* June 4, 1975, the date when Congress enacted compre-

and *Curran* supported implication of a private cause of action under § 17(a), the court in *Sheftelman v. Jones,* 605 F.Supp. 549 (N.D. Ga. 1984), noted:

> Even applying the test set forth in *Curran* and *Huddleston* leaves the court unconvinced that a private cause of action should be implied under section 17(a). *Because the courts that addressed the question before 1975 were divided as to whether a private right of action existed under section 17(a),* the court cannot determine whether Congress intended to permit a private right of action under this section when it revised the securities laws in 1975 without altering the language of section 17.

605 F.Supp. at 552 (emphasis added). Similarly, in *Brabham v. Patenta N.V.*, 614 F.Supp. 568 (D. Or. 1984), the court determined that *Huddleston* was inapplicable to § 17(a) because "[i]t can scarcely be said after a review of the case law in existence in 1975 that there was a 'judicial construction' of an implied private cause of action under § 17(a)." *Id.* at 570; *Memphis Housing Authority v. Paine, Webber, Jackson & Curtis, Inc.*, 639 F.Supp. at 113 ("the uniform and well-understood consensus of opinion required by *Curran* did not exist" with respect to § 17(a)).

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hensive amendments to the 1934 Act. *See, e.g., Jenson v. Continental Financial Corporation*, 404 F.Supp. 792 (D. Minn. 1975) (decided November 19, 1975); *Wulc v. Gulf & Western Industries, Inc.*, 400 F.Supp. 99 (E.D. Pa. 1975) (decided August 5, 1975); *Cass v. Prior*, 404 F.Supp. 780 (D. Minn. 1975) (decided December 8, 1975); *Newman v. Prior*, 518 F.2d 97 (4th Cir. 1975) (decided June 17, 1975). Congress, of course, could not have approved of judicial decisions which did not even exist at the time it amended the 1934 Act.

In addition, a reading of the Ninth Circuit's opinion in *Puchall* establishes that the Court did not depart from the governing standard in reaching its decision. Although the Ninth Circuit did observe, correctly, that "[n]o overwhelming consensus ever existed in section 17(a) precedent," it found that the cases addressing the availability of a private right of action "had not *consistently and routinely* implied a private remedy at the times when Congress undertook any significant analysis of the Securities Act." *Puchall*, 823 F.2d at 1357 (emphasis added). This holding is in full accord with the standard enunciated in *Huddleston* and *Curran*.[10]

III

PETITIONER HAS NO SUBSTANTIAL INTEREST AT STAKE IN THE ADJUDICATION OF THE § 17(a) ISSUE BECAUSE NO SIGNIFICANT RELIEF HAS BEEN DENIED TO PETITIONER BY VIRTUE OF THE DECISION BELOW

Petitioner, attempting to circumvent congressional intent, argues that if no private right of action is implied under § 17(a), she will be denied access to state court. Such a contention is without merit and is wholly irrelevant to a determination whether Congress intended to create a private right of action under § 17(a).[11]

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[10]The *Huddleston/Curran* test may be inapplicable in resolving the § 17(a) issue, because in 1975 Congress comprehensively amended only the 1934 Act, *not* the 1933 Act.

[11]Petitioner's heavy reliance on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), in support of its contention that failure to recognize a private cause of action under § 17(a) will somehow impede the benefits flowing from state court class actions is misplaced. The case does not even involve consideration of an implied right of action, and hardly constitutes authority for the implicit argument that public

First, no private litigant is foreclosed from state court by the decision below. Section 11 of the 1933 Act, 15 U.S.C. § 77k(a), explicitly provides that "any person" meeting the procedural and substantive requirements "may, either at law or in equity," file suit "in any court of competent jurisdiction." Section 12, 15 U.S.C. § 771, explicitly provides that persons violating its provisions "shall be liable" and that those wronged "may sue either at law or in equity in any court of competent jurisdiction." In addition, litigants are not foreclosed from choosing a state court forum to bring suits under state securities regulations or general fraud statutes. *See Reid v. Mann*, 381 F.Supp. at 528 (an aggrieved party "may seek redress in the state courts under state securities regulations or general fraud statutes").

In fact, the present shareholder class and derivatively represented corporation have not been denied a state forum. As previously noted, another state court derivative and class action complaint has been filed by a different party, but with some of the same counsel representing Petitioner, on behalf of the same class and corporation involved in the matter at hand and arising from the same transaction.

Second, it is specious to argue that because Congress chose in 1934 to vest *exclusive* jurisdiction in federal courts to entertain all claims under the 1934 Act (including those ultimately implied under § 10), it must have intended that jurisdictional requirement to be rendered meaningless by previous permission of the implication of

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policy grounds alone may excuse a court from applying the modified *Cort* analysis. In addition, as the Court observed, "If a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible." 472 U.S. at 820 (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 337 (1982)).

comparable private rights of action under the 1933 Act granting *concurrent* jurisdiction to state courts.[12] Congress intended private rights of action explicitly granted by the 1933 Act, not the rights of action similar to those subject to exclusive jurisdiction in federal courts under the 1934 Act, to be actionable in state courts without right of removal.

Third, as previously established, this Court has repeatedly emphasized that legislative intent is the touchstone for determining whether an implied private right of action exists. This Court consistently has rejected contentions that any and all private rights of action must be implied to further promote a statute. *See, e.g., Northwest Airlines, Inc.,* 451 U.S. at 89-90, 98 n.41 (even though "policy considerations favor the recognition of the right," these assumptions do not provide a sufficient basis for recognizing the right; "The equitable considerations advanced by petitioner are properly addressed to Congress, not to the federal courts."); *Texas Industries*, 451 U.S. at 646 ("we recognize that, regardless of the merits of the conflicting arguments, this is a matter for Congress, not the courts, to resolve").

Petitioner's wish to bypass the explicit requirements of the 1933 Act and the 1934 Act to press certain federal securities law claims in state court thus is inappropriate and seeks to evade contrary congressional intent.

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[12]As elaborated in footnote 6, *supra*, § 10(b), as interpreted by Rule 10b-5, proscribes conduct similar to that regulated under § 17(a) of the 1933 Act.

IV

REVIEW AND REVERSAL OF THE QUESTION PRESENTED ULTIMATELY WOULD NOT CHANGE THE RESULT REACHED BELOW

The procedural posture of this case also persuasively argues against this Court's exercise of its discretionary jurisdiction. The resolution of the question whether there exists an implied right of action under § 17(a) will have little bearing on the case at hand because independent grounds exist upon which to uphold the removal to federal court. Thus, even if this Court were to conclude that a private right of action exists under § 17(a), the court below still would be compelled to determine whether Petitioner properly pleaded a § 17(a) claim, and, if so, whether the RICO claims and § 17(a) claims were "separate and independent." The District Court found in Respondent's favor on both points. Indeed, to avoid the issuance of a purely advisory opinion in this case, the Court would have to rule broadly that § 17(a) creates a private right of action for persons, such as Petitioner and the class she purports to represent, who do not even claim to be "purchasers" or "sellers." Even if there were an actual inter-Circuit conflict, this Court presumably would not want to address the question in the context of this case, but rather in the context of a case involving a plaintiff who actually sold or purchased stock during the critical time period.

CONCLUSION

This Petition should be denied. There is no live conflict among the Circuits on the issue of a private right of action under § 17(a). A clear consensus among the federal courts, applying the standards articulated by this Court, is that no such private right of action exists. Finally, the procedural posture of this case makes it both an unnecessary and inappropriate one in which to exercise this Court's discretionary review.

DATED: March 11, 1988

Respectfully submitted,

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APPENDIX A

LIST OF RECENT CASES FINDING NO IMPLIED RIGHT OF ACTION UNDER § 17(a) BASED UPON ANALYSIS ESTABLISHED IN *CORT v. ASH* AND ITS PROGENY

FIRST CIRCUIT: *Prestera v. Shearson Lehman Brothers, Inc.*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,884, at 94,290 (D. Mass. 1986); *Kilmartin v. H.C. Wainwright & Co.*, 580 F.Supp. 604, 609 (D. Mass. 1984); *Kaufman v. Magid*, 539 F.Supp. 1088, 1098 (D. Mass. 1982).

SECOND CIRCUIT: *Cohen v. Goodfriend*, 665 F.Supp. 152, 155-56 (S.D.N.Y. 1987); *Ackerman v. Clinical Data, Inc.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,207, at 91,570-71 (S.D.N.Y. 1985) *But see Toberoff v. B-J, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,611 at 97,739 (S.D.N.Y. 1988) (following *Kirshner*).

THIRD CIRCUIT: *Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482, 1496 (D. Del. 1984); *Hill v. Equitable Trust Co.*, 562 F.Supp. 1324, 1345 (D. Del. 1983); *Kimmel v. Peterson*, 565 F. Supp..476, 485-88 (E.D. Pa. 1983); *Hill v. Der*, 521 F.Supp. 1370, 1375-78 (D. Del. 1981); *see also Mursau Corp. v. Florida Penn Oil & Gas, Inc.*, 638 F.Supp. 259 (W.D. Pa. 1986), *aff'd without opinion*, 813 F.2d 398 (3d Cir. 1987).

FIFTH CIRCUIT: *Corwin v. Marney, Orton Investments*, 788 F.2d 1063, 1066 (5th Cir. 1986); *Landry v. All American Assurance Co.*, 688 F.2d 381, 387-91 (5th Cir. 1982); *see also Keys v. Wolfe*, 709 F.2d 413, 416 (5th Cir. 1983); *Simpson v. Southeastern Investment Trust*, 697 F.2d 1257, 1258 (5th Cir. 1983).

SIXTH CIRCUIT: *Memphis Housing Authority v. Paine, Webber, Jackson & Curtis, Inc.*, 639 F.Supp. 108, 111-14 (W.D. Tenn. 1986); *Jones v. First Equity Corp. of Florida*, 607 F.Supp. 350, 354-55 (E.D. Tenn. 1985); *Basile v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 551 F.Supp. 580, 586-87 (S.D. Ohio 1982); *Ingram Industries, Inc. v. Nowicki*, 502 F.Supp. 1060, 1069 (E.D. Ky. 1980).

SEVENTH CIRCUIT: *Design Time, Inc. v. Synthetic Diamond Technology, Inc.*, 674 F.Supp. 1564, 1574 (N.D. Ind. 1987); *Wagman v. FSC Securities Corp.*, [1985-1986 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,445, at 92,716 (N.D. Ill. 1985); *Beck v. Cantor, Fitzgerald & Co.*, 621 F.Supp. 1547, 1559-60 (N.D. Ill. 1985); *Citizens State Bank of Wittenberg v. Continental Assurance Co.*, 598 F.Supp. 1111, 1114-15 (W.D. Wis. 1984); *Roskos v. Shearson/American Express, Inc.*, 589 F.Supp. 627, 630-31 (E.D. Wis. 1984).

NINTH CIRCUIT: *Puchall v. Houghton, Cluck, Coughlin & Riley (In re Washington Public Power Supply System Securities Litigation)*, 823 F.2d 1349 (9th Cir. 1987); *David K. Lindenmuth Co. v. Shannon Financial Corp.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,852 (N.D. Cal. 1986); *B&B Masonry Co. v. Young, Smith & Peacock, Inc.*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,707 (D. Ariz. 1986); *Riley v. Brazeau*, 612 F.Supp. 674, 679 (D. Or. 1985); *Brabham v. Patenta N.V.*, 614 F.Supp. 568, 569-71 (D. Or. 1984); *Bruns v. Ledbetter*, 583 F.Supp. 1050, 1053-54 (S.D. Cal. 1984); *In re Fortune Systems Securities Litigation*, 604 F.Supp. 150, 155-58 (N.D. Cal. 1984); *Hudson v. Capital Management International, Inc.*, 565 F.Supp. 615, 620 (N.D. Cal. 1983); *McFarland v. Memorex Corp.*, 493 F.Supp. 631, 651-53 (N.D. Cal. 1980).

TENTH CIRCUIT: *Jiffy Lube International, Inc. v. Grease Monkey Holding Corp.*, 671 F.Supp. 1275, 1278 (D. Colo. 1987); *In re Storage Technology Corp. Securities Litigation*, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,716, at 93,479-80 (E.D. Colo. 1986); *Masri v. Wakefield*, 602 F.Supp. 404, 406 (D. Colo. 1983); *Freeman v. McCormack*, 490 F.Supp. 767, 768 (W.D. Okla. 1980); *Williams v. Nutritional Associates, Ltd.*, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,678 (W.D. Okla. 1980); *cf. Ohio v. Peterson, Lowry, Rall, Barber & Ross*, 651 F.2d 687, 689 n.1 (10th Cir.), *cert. denied*, 454 U.S. 895 (1981) (expressing "considerable doubt" that private action exists).

ELEVENTH CIRCUIT: *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 784-85 (11th Cir. 1988); *Scharp v. Cralin & Co., Inc.*, 617 F.Supp. 476, 478 (S.D. Fla. 1985); *Sheftelman v. Jones*, 605 F.Supp. 549, 552 (N.D. Ga. 1984); *Summer v. Land & Leisure, Inc.*, 571 F.Supp. 380, 387 (S.D. Fla. 1983); *Fallani v. American Water Corp.*, 574 F.Supp. 81, 84 (S.D. Fla. 1983); *Blumberg v. Berland*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,389 (N.D. Ga. 1981), *aff'd*, 678 F.2d 1068 (11th Cir. 1982) (*per curiam*).

D.C. CIRCUIT: *Hammerman v. Peacock*, 607 F.Supp. 911, 915 (D.D.C. 1985).

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 11, 1988, I served the within Respondent's Brief in Opposition to Petition for Writ of Certiorari in re: "A. Jacques Lou vs. William Belzberg" in the United States Supreme Court, October Term 1987, No. 87-1430;

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

Executed on March 11, 1988, at Los Angeles, California

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